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No 04-1739

IN THE

Supreme Court of the United States

JEFFREY BEARD,

Petitioner

v.

RONALD BANKS,

Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS*

The Becket Fund for Religious Liberty respectfully submits this brief *amicus curiae* in support of Respondent pursuant to Rule 37.3 of this Court.[1]

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan public interest law firm dedicated to protecting the free expression of *all* religious traditions and the equal participation of religious people in public life and public benefits. Over its first twelve years of existence, The Becket Fund has represented Buddhists, Christians, Hindus, Jews, Muslims, Native Americans, Sikhs, and others in cases involving the full range of religious freedom issues under federal and state constitutional and statutory law. In particular, *amicus* has been intimately involved as either lead counsel or *amicus curiae* in numerous cases defending the religious exercise rights of prisoners.

Amicus submits this brief to highlight the danger of upholding the deprivation theory of behavior modification advanced by Petitioner to defend its suppression of the constitutional right at issue in this case. Because deprivation theory transforms constitutional rights into mere privileges that can be manipulated at will by prisons to gain leverage over inmates, endorsement of this theory by this Court will grant prisons the ability to declare open season on all constitutional rights in the prison setting. Inevitably, the

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[1] All parties have consented to the filing of this brief. Consent letters from Petitioner and Respondent are being filed concurrently with this brief. No counsel for any party authored this brief in whole or in part. No person or entity other than *amicus* made any monetary contribution to the preparation or submission of this brief.

most valued constitutional rights of prisoners—like the free exercise of religion—will be most at risk because the deprivation theory has its greatest usefulness for prisons when it targets the most-treasured constitutional rights for suppression.

SUMMARY OF ARGUMENT

The petitioner to this Court raises a unique theory—the deprivation theory of behavior modification—to justify its suppression of the constitutional rights in this case. On this theory, inmates who behave as the prison wants will be rewarded by being granted so-called "privileges." Inmates who do not are denied these privileges. The power to selectively grant or deny privileges in this way gives the prison significant leverage over its inmates.

At first glance, deprivation theory, especially when applied to true privileges such as use of the weight room or access to cigarettes, seems innocuous. After all, with incarceration comes the forfeiture of most freedoms that law-abiding citizens enjoy. But when deprivation theory is applied to suppress not mere *privileges*, but constitutional *rights* that prisoners do *not* forfeit upon incarceration, *Bell* v. *Wolfish*, 441 U.S. 520, 545 (1979) ("convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison."), the theory transforms from innocuous to insidious.

The central tenet of deprivation theory is that prison authorities should be able to use constitutional rights as levers to induce prisoners to behave the way the prison wants. But under this theory, of course, constitutional rights are no longer rights not subject to forfeit—they are mere licenses (on par with such trivial privileges as using the weight room) that the prison can give or take depending on what it believes best.

And there is no stopping point to deprivation theory's vicious logic. The right threatened by deprivation theory in this case—the right of inmates to receive publications—has long been considered constitutional by this Court. *See Thornburgh* v. *Abbott*, 490 U.S. 401, 408 (1989). So if

deprivation theory can be applied to deny this right, nothing will stop prison officials from applying it to deny other fundamental rights, especially the right to free exercise of religion. Indeed, it is a perverse irony of deprivation theory that the more fundamental the constitutional right, the more incentive the government has to deny the right because prisons will gain the most leverage over the behavior of prisoners by taking away the most important and valued rights. When prisons recognize these simple facts, they will use deprivation theory whenever possible—which is to say that there will soon be no constitutional rights left for those in prison.

Because deprivation theory transforms constitutional rights into mere privileges that can be manipulated at will by prison officials, the theory is fundamentally inconsistent with this Court's precedents that inmates retain constitutional rights in prison, and this Court should reject it. In addition, as discussed below, deprivation theory is incompatible with the four factors for assessing constitutional claims in the prison context laid out in *Turner* v. *Safley*, 482 U.S. 78 (1987). Deprivation theory is not neutral because it is directly related to the suppression of constitutional expression and it is designed to close off all alternative avenues of expression of the constitutional right at issue. And unlike the ordinary case, where the prison claims that suppression of the right is needed to prevent some negative secondary effect, deprivation theory rests on the premise that the "harm" arises not from a secondary effect, but from the mere fact that the inmate has a right that can be exercised without the prison's consent.

ARGUMENT

I. DEPRIVATION THEORY IS INCOMPATIBLE WITH MAINTAINING INMATES' MOST FUNDAMENTAL CONSTITUTIONAL RIGHTS

This Court has made clear that that, "as members of this society, prisoners retain constitutional rights that limit the exercise of official authority against them." *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 355 (1987). *See also Overton* v. *Bazzetta*, 539 U.S. 126, 138 (2003) (Stevens, J., concurring) (the "restraints and the punishment which a criminal conviction entails do not place the citizen beyond the ethical tradition that accords respect to the dignity and intrinsic worth of every individual.") (citations and quotations omitted). To be sure, constitutional rights in prison are subject to limitations, "both from the fact of incarceration and from valid penological objectives." *O'Lone*, 482 U.S. at 348. Some rights are difficult to reconcile with the nature of prison, *see, e.g.*, *Overton*, 539 U.S. at 131 ("freedom of association is among the rights least compatible with incarceration"), and other rights, when exercised, can pose harm to a prison's interests by creating "legitimate security concerns" or causing harmful "ramifications on the liberty of others." *Turner* v. *Safley*, 482 U.S. 78, 90-91 (1987). But though the exercise of constitutional rights is subject to limits, this Court has removed all doubt that prisoners are still endowed with constitutional *rights*—not mere privileges—when incarcerated. *See Bell* v. *Wolfish*, 441 U.S. 520, 545 (1979) ("convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison.").

At one level, Pennsylvania's effort to restrict the right of prisoners to receive harmless newspapers, magazines, and photographs seems to present an ordinary application of the

analysis the Court has developed for addressing prison infringements of constitutional rights: the state has limited inmates' access to publications; this Court has held that inmates have a constitutional right to receive publications, *see Thornburgh* v. *Abbott*, 490 U.S. 401, 408 (1989); therefore, the four-part *Turner* test must be applied to assess the constitutionality of the infringement.

But what makes this case far from ordinary is the novel "deprivation theory of behavior modification," Petitioner's Br. at 26,[2] advanced by Pennsylvania to defend its policy of suppressing constitutional rights. As *amicus* explains below, the deprivation theory is significant because if endorsed by this Court it will grant prisons free rein not only to deny the constitutional right to receive publications at issue in this case, but to deny the right to free exercise of religion and all other constitutional rights in prison.

The deprivation theory is easy enough to describe. The state, in its brief, explains it succinctly: "By treating access to newspapers and magazines as a *privilege* to be earned (or retained), the LTSU program provides an incentive for good behavior and a deterrent to bad behavior." Pet. Br. at 5 (emphasis added). The theory is equally easy to understand. Inmates who behave as the prison wants will be rewarded by the grant, at the prison's discretion, of the "privilege" of exercising constitutional rights. Inmates who do not are denied this "privilege." Psychologists might

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[2] In the courts below, Pennsylvania asserted two other theories to justify the policy at issue—it claimed that the restricted materials could be used either as contraband or as a means to conceal contraband. *Amicus* does not doubt that such fears, if properly substantiated, might be sufficient to sustain the policy. But the court below found little evidence in the record to support those concerns, and the state in this Court seems to have largely given up on these arguments.

describe this conditioning process as "positive and negative reinforcement," but one need not be a psychologist to understand the simple operational premise of this theory.

Though its simplicity may lend the appearance of harmlessness, the deprivation theory is in fact radically different from other justifications for prison regulations that restrict the exercise of constitutional rights. In the ordinary case, the prison identifies some negative consequence that may result from the exercise of the right in the prison setting. Perhaps the exercise of the right will endanger "legitimate security concerns," or have a harmful impact on the prison guards, other inmates, or prison resources. *Turner*, 482 U.S. at 90-91. In this way, the prison usually alleges some harm flowing from the exercise of the right—either to its own interest or of others—and then adds that other avenues are available for exercising the constitutional right that would not threaten those interests. *Id.*

In contrast, the deprivation theory does *not* rest on the idea that exercise of the right harms some interest of the prison. For example, in this case, Pennsylvania does not claim that the right to receive publications is incompatible with the mere fact of incarceration. Nor does it allege that this right causes any latent harm, or risk of harm, to its interests. Indeed, Pennsylvania does not claim that the exercise of the constitutional right will pose any harm or difficulty for anyone. Instead, the prison prevents exercise of the constitutional right simply because it wants to induce prisoners to behave differently. The inmates will understand this and will, if they wish to regain the ability to exercise even the constitutional rights they retain in prison, conform their behavior to the desired standard. As a result, deprivation theory enables prisons (like Pennsylvania here) to convert constitutional rights into mere privileges that can be used as levers—as sticks and carrots—to force inmates into complying with whatever rules the prisons may set.

The opinions below and the Petitioner and its *amici* debate at length whether the deprivation theory will be effective in achieving its goals. But effectiveness is beside the point where the means used to achieve the desired goal are illegitimate. And this is the real problem with deprivation theory: it is antithetical to the fundamental premise of this Court's precedents that prisoners retain constitutional rights, not just privileges, that constrain the power of prison authorities. Indeed, deprivation theory has no limiting principle; under it, all constitutional rights become mere licenses that prison officials can take away at their discretion.

Deprivation theory provides the state with a rationale for taking away *any* constitutional rights a prisoner may have, because anything that is of value to a prisoner will now be of value to the state as leverage. This is of particular concern to *amicus*, who works to protect the religious exercise rights of inmates. At least for the present, Pennsylvania does not apply deprivation theory to limit religious exercise—religious material is exempted from the general ban on publications, and chaplain visits are exempted from the general ban on visitation.

But this is small consolation to *amicus*, for Pennsylvania's argument that constitutional rights are mere privileges that can be withheld at will may end at any time. The right to religious exercise—including access to the Bible or other sacred texts—is a fundamental guarantee of the Constitution, not a mere privilege that can be withdrawn at the whim of prison officials.

Thus, although Pennsylvania exempts religious materials from its policy today, it may not do so tomorrow if it decides that withholding access to religious texts would enhance its leverage over prisoners. And, of course, other

prison systems might go even further, not only denying prisoners access to texts, but denying the ability to exercise their religion altogether: prohibiting them from praying, attending worship services, keeping a religious diet, observing sacraments, receiving or using devotional items, or consulting with chaplains. Deprivation theory not only permits such an approach, but recommends it—for depriving prisoners of such a fundamental right as religious exercise will only enhance the leverage of prisons under the deprivation theory.

The undermining effect of deprivation theory on constitutional rights in prison is also highlighted by its potential effects on the constitutional right to marry. In *Turner*, the Court recognized the right to marry as a fundamental right that prisoners retain, and held that the prison in that case had not demonstrated a sufficient logical nexus between the prison's asserted interests of security and rehabilitation and its policy of limiting marriage. But the very importance to inmates of the right to marry would provide the requisite logical nexus for supporting the prison's justification for using it as lever to modify behavior under the deprivation theory. For the very things that make the right to marry so important to inmates would also motivate inmates to conform their behavior to whatever standard the prison may set in order not to lose it.

This is perhaps the most perverse aspect of deprivation theory. A state's incentive to use constitutional rights as leverage will be directly proportional to the importance of those rights to inmates. And so the best way for the state to gain the most leverage over inmates is to use their most fundamental constitutional rights as incentives. So, if Pennsylvania is correct that use of deprivation theory will cause inmates to change their behavior if they're denied access to photographs and magazines, how much greater will prisons' leverage be if they can manipulate inmates by

withholding the right to read the Bible, worship, pray, marry, or engage in any other constitutionally protected activity?[3]

It is this perversity of the deprivation theory that led Judge Tatel of the D.C. Circuit to issue a stinging criticism of another incarnation of the deprivation theory. In *Kimberlin* v. *Department of Justice*, 318 F.3d 228 (D.C. Cir. 2003), the federal Bureau of Prisons advanced the same deprivation theory asserted here, labeling it instead an interest in punishment and deterrence. Judge Tatel quickly cut right to the core of this argument:

> Does the goal of enhancing the punitive and deterrent value of prison by making prison conditions more onerous justify limiting prisoners' constitutional rights? As long as *Safley* is the law – that is, as long as prisoners generally retain their constitutional rights – the answer must be no, for there is no discernible limit to the government's ability to invoke punishment or deterrence as reasons for adopting regulations that restrict constitutional rights. Th[is] rationale . . . could also justify banning . . . all books, including the Bible and the Koran, on the ground that denying these "perks" will make

[3] In addition to the constitutional problems that deprivation theory raises, there is a thorny statutory issue as well. The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc, prevents state prisons from substantially burdening religious exercise, unless the burden is the least restrictive means of serving a compelling government interest. *See Cutter* v. *Wilkinson*, 125 S. Ct. 2113 (2005). If this Court were to sanction deprivation theory, the question of whether (and in what circumstances) deprivation theory could constitute such a compelling interest would be an issue that would surely soon come before the Court.

> prison more onerous and more of a place of deterrence and punishment.

Id. at 239 (Tatel, J., concurring in part and dissenting in part) (citations and quotations omitted).[4]

Moreover, if this Court deems the deprivation theory of behavior modification a "legitimate penological interest" that may justify the deprivation of constitutional rights, prisons will have a strong incentive to recast all of their policies in terms of it. Deprivation theory's rationale can provide constitutional cover for *every* policy limiting the exercise of constitutional rights in prison. Deprivation theory will then expand, as prisons recognize their interest in creating incentive schemes wherever possible. And as it expands, the exercise of constitutional rights most precious to prisoners will shrink and the Court's promise that "prisoners retain constitutional rights that limit the exercise of official authority against them," *O'Lone*, 482 U.S. at 355, will be reduced to a nullity.

Significantly, Pennsylvania and its *amici* do not deny that the more fundamental (and thus desirable to the inmate)

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[4] In *Kimberlin*, the court ultimately ruled for the government, but on the basis that the privilege denied the prisoner in that case—playing the electric guitar—"does not implicate the appellant's First Amendment rights and . . . we therefore need not invoke the four factor analysis the United States Supreme Court established in *Turner*." *Id.* at 232. Indeed, the approach of the D.C. Circuit also demonstrates another point. Prisons will be able to maintain plenary control over the vast majority of true privileges in prison—whether it be access to electric guitars, the weightroom, or cigarettes—because not every inmate activity is imbued with constitutional significance. But what this Court should not countenance is prisons re-defining true constitutional rights like free exercise of religion as just another "privilege" like electric guitar playing that can be manipulated at will by prison officials.

the constitutional right, the more tempted prisons will be to suppress the exercise of that right under the deprivation theory. Instead, they either embrace this as a virtue, *see, e.g.*, Brief for United States as Amicus Curiae Supporting Petitioner, at 19 n.7 (stating that there is "a common-sense logical connection between the denial of desirable inmate privileges and the objective of inducing behavioral reform"), or seek to whitewash the issue by steadfastly referring to constitutional rights as mere "privileges." *See, e.g.*, Petitioner's Brief at 5; Brief for United States (using the word "privilege" 36 times in its argument section alone, and questioning whether so-called "privileges that implicate First Amendment interests" of inmates should be treated as "categorically different from other privileges" under the Constitution.)

Neither approach provides a basis to upset the balance this Court struck in *Turner*, when it pledged to be "responsive both to the policy of judicial restraint regarding prisoner complaints and to the need to protect constitutional rights." *Turner*, 482 U.S. at 85 (citations omitted). Although Pennsylvania now wants to use the deprivation theory to re-weight the *Turner* balance in its favor, this Court should adhere to its pronouncement that "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison," *Bell*, 441 U.S. at 545, and reject deprivation theory as a basis for limiting constitutional rights.

II. DEPRIVATION THEORY IS INCOMPATIBLE WITH THE FOUR *TURNER* FACTORS

The attempt to jeopardize all constitutional rights in prisons in a single stroke—by recasting them as mere privileges that the state can leverage for its own ends—should be reason enough to reject the deprivation theory. But deprivation theory is unacceptable for a second reason: it is

incompatible with the application of the traditional *Turner* v. *Safley* factors.

Turner's first prong requires that the government be acting pursuant to a "valid penological interest" that is both "legitimate and neutral." *Turner* v. *Safley*, 482 U.S. 78, 90-91 (1987). And for the interest to be "neutral," this Court has explained, it must be "'unrelated to the suppression of expression.'" *Thornburgh* v. *Abbott*, 490 U.S. 401, 415 (1989) (citing *Procunier* v. *Martinez*, 416 U.S. 396, 413 (1974)); *see also Turner*, 482 U.S. at 83 (repeating this test). But under deprivation theory, the state's interest is not just *related to* the suppression of the right, the state's interest here *is precisely* the suppression of the right.

Unlike the typical case of a prison regulating a constitutional right, the deprivation theory does not attempt to curb some unprotected aspect of the right or quell some negative effect (*e.g.*, security) associated with the exercise of the right. *Cf. Thornburgh*, 490 U.S. at 415 (preventing certain publications from reaching prisoners because "of their potential implications for prison security"). Instead, under the state's deprivation theory, denial of the constitutional right (whether it be the right to receive publications as in this case, or the right to read the Bible or other sacred text in the next) is precisely the goal of the regulation. This point should be clear from the theory's title. Deprivation theory requires the deliberate suppression of inmate constitutional rights, and for the very sake of inflicting the consequent harm on the inmate.

Pennsylvania seeks to avoid the obvious conclusion that its use of deprivation theory is aimed at the suppression of a constitutional right by claiming that its true goal here is to facilitate rehabilitation of prisoners. But the claim that transforming constitutional rights into a mere privilege that the prison can withdraw at any time under the guise of this

noble purpose does not suffice to undo the damage of deliberately targeting a constitutional right for extinction. For that purpose (whether it be rehabilitation or something else) is purely derivative of the initial improper purpose, and just as much related to the suppression of expression. *See* John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1496-97 (1975) ("The constitutional reference must therefore be not to the ultimate interest to which the state points, for that will always be unrelated to [the suppression of the constitutional right,] but rather to the causal connection the state asserts.").[5]

Turner's first prong is therefore fatal for deprivation theory. But deprivation theory is also deeply inconsistent with the rest of the *Turner* factors. The *Turner* framework is premised on a situation where the prisoner seeks exercise of a right, and the prison claims some conceptually distinct harm arising from the right's exercise. Courts then evaluate whether the prison policy still allows other avenues of expression of the right (the second *Turner* factor); the impact that an inmate's exercise of the right has on other inmates, guards, and prison resources (the third *Turner* factor); and whether the prison could somehow avoid harm to valid penological interests without infringing the right (the fourth *Turner* factor). *See Turner*, 482 U.S. at 90-91. But the

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[5] Petitioner and its *amici* make much of stray language in this Court's opinion in *Overton v. Bazzetta*, 539 U.S. 126 (2003), which they claim supports use of the deprivation theory. But the permissibility of the deprivation theory was neither squarely presented nor briefed in *Overton* and was certainly not essential to the holding of that case, that restricting visitation rules "to prevent smuggling or trafficking in drugs," *id.* at 129, by inmates imprisoned for that very crime was a constitutionally permissible penological interest.

application of deprivation theory renders consideration of these factors incoherent.

Consider *Turner*'s second factor—the question of whether other avenues exist for the exercise of the asserted right. That factor does not harmonize with successful implementation of the deprivation theory, because it puts a prison in a very strange position. The prison has to argue that there are other ways for the prisoner to exercise his rights, but the very existence of those alternative avenues undermines the system of incentives necessary to the operation of the deprivation theory—for a prison cannot gain any leverage from the taking away of a constitutional right if the right is easily obtained in some other way. The Solicitor General implicitly recognizes this, and sees in it an opportunity to eviscerate the requirement of alternative means altogether. *See* Brief for United States as Amicus Curiae Supporting Petitioner, at 11 ("Although inmates have no alternative means of receiving newspapers, magazines, and photographs [under Pennsylvania's use of the deprivation theory] . . ., the very object of the restrictions is to deny those materials in order to induce behavioral reform.").

The third *Turner* factor—the impact that an inmate's exercise of the right has on other inmates, guards, and prison resources—is similarly inconsistent with deprivation theory. Again, unlike the normal case where the prison claims that exercise of the right in prison creates some type of negative secondary effect, deprivation theory makes no claim that the exercise of the right has such a harmful impact on other inmates, guards, or prison resources. Indeed, the prison is perfectly willing to allow the activity countenanced by exercise of the right, but only if the inmate will first behave the way the prison wants.

But perhaps the best example of the inconsistency between deprivation theory and *Turner*'s framework arises under the fourth factor. That factor examines whether there are "ready alternatives" to the regulation that "fully accommodate the prisoners' rights at *de minimis* cost to valid penological interests." *Turner*, 482 U.S. at 90-91. In other words, it asks whether the prison can address the harm that exercise of the constitutional right creates without infringing the right itself. The central premise of this factor is that any harm to the prison's interests is conceptually distinct from the right. But in the view of deprivation theory, the harm to the prison *is* the very fact that the inmate is endowed with a right that can be exercised without the prison's approval.

This is where *Turner* truly breaks down, for it makes no sense to ask whether the prison can permit the exercise of the right and still maintain its objectives, when its very objective is to stop prisoners from having a right that inmates can exercise without prison approval in the first place. This is why Pennsylvania does not address the fourth *Turner* factor and the Solicitor General treats it as tautologically satisfied. *See* Brief for United States, at 29 (arguing that "partially restoring the denied privileges" would "nullify the basic object of the restrictions" because the basic object of the restrictions was indeed to deny the privileges).

In sum, deprivation theory is incompatible with all of the *Turner* factors and should therefore be rejected as a legitimate justification for restricting the exercise of constitutional rights (as opposed to non-constitutional privileges).

CONCLUSION

For generations now, inmates have relied on the Court's promise that "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and

confinement in prison." *Bell*, 441 U.S. at 545. Deprivation theory, if accepted by the Court, will bury that promise and the *Turner* framework along with it. It will represent the beginning of the end of constitutional rights in prison. The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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